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Constitutionalism in the sources of the Union law. The role of the CJEU and the vexata quaestio of horizontal effectiveness in directives

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Abstract: This work seeks to investigate the reform treaty, i.e. the elements involved by the previous treaties and symbolically eliminated. The Treaty of Lisbon has maintained the innovations, especially, in the sources of secondary law as well as its relationship with national law and especially in the sector of direct effect. The process of constitutionalization of the Union started years ago, as an important stage of the process of the European integration. The horizontal effectiveness of directives finds ample space in the jurisprudence, making steps forward in the matter. It has established for national judges to be free to the attribution of directives, that are endowed with direct effectiveness to private individuals, when the same legal system of the Member States presents and allows it.

Keywords: Treaty of Lisbon; process of constitutionalization of the European Union; EU derived sources; EU legislative acts;

horizontal directives; non-legislative EU acts; direct effect of directives; primacy of Union law; conforming interpretation; indirect effects.

Introduction

The Treaty of Lisbon deserves a first mention, after fifteen years of its adoption. More precisely, to analyze the innovations it has established.¹ Such innovations have to do with the replacement of the old European Community with the Union; the abolition of the three pillars; the formalization of the European Council as well as of its president; the binding nature of the charter of rights. The latter, through Art. 6 TEU, has obtained the “legal value of the Treaties”, even though it has not been inserted within it (Chalmers, Davies, Monti, Heyvaert, 2024).

Interesting are the sources of law and their interpretation by the European institutions. The reforms carried out over the years showed the constitutionality of the treaty as well as a

¹See in particular the Presidency Conclusions of the European Council held in Brussels on 21 and 22 June 2007, 11177/1/07 REV 1: https://www.cvce.eu/en/obj/conclusions_of_the_brussels_european_council_21_and_22_june_2007-en-98665b8d-123c-452f-9fd1-fdec71a41aac.html (Accessed on 10.09.2025) according to which: “(...) the repeal of all existing Treaties and their replacement by a single text called “Constitution”, is abandoned (...) TEU and the Treaty on the Functioning of the Union will not have a constitutional character. The terminology used throughout the text of the Treaties will reflect this change: the term “Constitution” will not be used, the “Union Minister for Foreign Affairs” will be called the High Representative of the Union for Foreign Affairs and Security Policy and the terms “law” and “framework law” will be abandoned while the current terms “regulations”, “directives” and “decisions” will be retained (...) amended Treaties will not contain any article referring to EU symbols such as the flag, the anthem or the motto. As regards the primacy of EU law, the IGC will adopt a declaration containing a reference to the case law of the Court of Justice of the EU (...)”.

compromise that has often characterized the development of the European integration process.

The opportunities, (Weiller, 2000) of a Europe with a new constitution (Weiler, 1999; Shaw, 1999; Weiler, Wind, 2003; Habermas, 2004; Fossum, Menéndez, 2004) and a European people (Grimm, 1995), have been identified by the jurisprudence of the CJEU. Such a constitution is of a multilevel nature, the result of constant work at constitutional, national and European level (Pernice, 1999; Martinico, 2013).

The Lisbon Treaty has been represented as an evolutionary process, that built categories of principles, typical of a modern constitutionalism, for the Union.

The treaty has also used, in various ways (Martinico, 2013), an organizational process, which looks like a union of states of a federal type (Hay, 1966; Stein, 1981). A union that has included some principles of international law regarding the common market as well as the protection of fundamental rights on economic objectives (Lenaerts, 2000) and through constitutional values (Snyder, 2003; Rittberger, Schimmelfemmnig, 2006).

The federalization of the Union by giving primacy to an effectiveness of the EU Member States' legal systems, sought to integrate two different levels. It is a typical mechanism of a constitution of federal states that simultaneously protect the inviolable rights of individuals and strengthen the democratic

principles of rights, which respect the levels of government and integration at high and even strong levels.

The question is whether the Treaty of Lisbon has contributed to the constitutionalization of the Union by also including the profile of a legal federalization? A federalization that consciously demonstrates the peculiarities of the Union and respects state, constitutional contents.

In this spirit, the influence of the Treaty of Lisbon on the system of secondary sources of the Union is noted. An examination of the aspects, that consider the normative analysis in the field of secondary sources, shows the objective of highlighting the potential of institutional configuration and balance within the Union.

Similarly, the distribution of competences between Member States and the Union verifies the potential translated in a precise manner. The changes in the organization of relations between Union and national law after Lisbon are evident, especially in the sector of direct effect through the outcomes of case law, in this regard.

Derived sources and innovations introduced by the Treaty of Lisbon

As we have predicted, the abolition of the three-pillar structure has extended the typology of sources, that derive from and are

provided for by the European Community to all sectors of action of the Union (despite the fact that the Common Security and Defence Policy (CSDP) is carried out internally) and especially concerning the role of the European Parliament and of the CJEU. The Neves 77 Solutions Spa case of 10 September 2024 has opened a way to new scenarios.²

This is a case based on sanctions of the Russian Federation. In it, the CJEU has admitted, by the way, the competence to interpret restrictive measures of a general nature contained within the CSDP, when the Council had the duty/right to insert such measures, based on a regulation inspired by ex Art. 215 TFEU (Kellerbauer, Klamert, Tomkin, 2024).

In the KS and KD case³ an appeal has initiated by persons who had fallen in Kosovo in 1999. In that case, it was asserted the non-contractual liability of the Council, of the European Commission and of the European External Action Service (EEAS) for violation of fundamental rights, through the civil mission of the Union Eulex Kosovo.

The judge of the Luxembourg, precisely, has interpreted and evaluated the legitimacy of acts adopted within the CSDP framework since they do not directly constitute the

²CJEU, 10 September 2024, C-351/22, Neves 77 Solutions SR v. Agenția Națională de Administrare Fiscală-Direcția Generală Antifraudă Fiscală, ECLI:EU:C:2024:723, published in the electronic Reports of the cases.

³CJEU, 10 September 2024, joined cases C-29/22 P e C-44/22 P, KS and KD v. Council and others, ECLI:EU:C:2024:725, published in the electronic Reports of the cases.

implementation of political and strategic choices (Lenaerts, Gutiérrez-Fons, 2020). The practical difficulties in its assertion does not include all the criteria, that allow to distinguish a precise existing presupposition (Breitler, 2022; Kunst, 2023).

In the field of CSDP, jurisprudential developments, according to Art. 288 TFEU (Kellerbauer, Klamert, Tomkin, 2024), are linked to the European institutions and in particular with the competences of the Union, that have exclusively adopted regulations, decisions, directives, recommendations, and opinions, i.e. non-binding acts.

According to Art. 288 TFEU (Kellerbauer, Klamert, Tomkin, 2024) decisions addressed to recipients similar to individual administrative acts, that remain in the current text admitting the existence of decisions to addressed subjects. Decisions that have a general scope, within the CSDP, are important. They have replaced the previous instruments of the second old pillar. They are similar to decisions concerning the process of European integration even if the differences between decisions, that indicate the recipients of the regulations, do not disappear.

In this way, we can think that the Lisbon Treaty has imported, within the CSDP sector, an instrument with direct effect (De Witte, 2008). The choice to call the acts of the CSDP, as decisions, has a symbolic relevance, which makes valid any doubt, that has to do with political acts, which underline their

binding character, from a legal point of view.

The general categories of acts do not change and do not register significant changes. The co-decision procedure expresses an ordinary legislative procedure, which continues to exist alongside the special legislative procedures, which characterise their adoption by the European Parliament.

Additionally, the participation of the Council in this process, and not the joint adoption by the institutions, is based on Art. 289, par. 1 and 2 of the TFEU (Kellerbauer, Klamert, Tomkin, 2024). This is a qualification of ordinary procedure, which has no formal value but in practice indicates the breadth of its application, which makes express reference to co-decision. In reality, there are few cases, that allow the use of special legislative procedures.⁴

A distinction is introduced between legislative acts, which are not based on Art. 289, par. 3 TFEU (Kellerbauer, Klamert, Tomkin, 2024) but on formal criteria that follow the legislative procedure of legislative acts. Two categories of non-legislative acts are regulated separately, namely the delegated acts based on Art. 290 TFEU (Kellerbauer, Klamert, Tomkin, 2024) and the implementing acts of Art. 291 TFEU.

⁴List of legal bases providing for the ordinary legislative procedure in the Treaty of Lisbon, included: A6-0013/2008, Report on the Treaty of Lisbon 2007/2286 (INI): https://www.europarl.europa.eu/doceo/document/A-6-2008-0013_EN.html (Accessed on 10.09.2025).

More specifically, Art. 290 TFEU defines the delegated acts, as non-legislative acts of a general nature, which only the European Commission authorizes and adopts (Egeberg, Trondal, 2017).⁵

Art. 291 TFEU (Kellerbauer, Klamert, Tomkin, 2024) uniformly defines the execution of binding legal acts of the Union, which confer implementing powers to the European Commission as well as exceptional cases to the Council (Craig, 2008).⁶ Both entered into force with the Treaty of Lisbon (De Witte, 2008).⁷ They fall into the broad category of implementing acts and are subject to comitology, which governs decisions of the Council

⁵CJEU, 22 January 2014, C-270/12 *UK v. Parliament and Council*, ECLI:EU:C:2014:18, published in the electronic Reports of the cases, par. 79: “(...) while it is true that the Treaties do not contain any provision allowing powers to be conferred on a body, office or agency of the Union, the fact remains that many provisions of the FEU Treaty presuppose the existence of such a possibility” and, therefore, held that this regulation was not incompatible with Articles 290 and 291 TFEU (...)”.

⁶Craig affirms that: “(...) the relevance of uniform conditions of execution is at least questionable if the act to be executed is a regulation, given its direct applicability (...) the same perplexity arises in relation to directives which, leaving their implementation as to the ways and means to the discretion of the States, it is not clear how they can require uniform conditions of execution without contradicting their very nature.

⁷De Witte also affirms that: “(...) new category of delegated acts has not come out of the blue (...) latest development in a long-standing bargaining process between the EU institutions on where to draw the line between the role of the legislative and the executive Legal Instruments (...)”.

of 1987,⁸ 1999⁹ and 2006.¹⁰ This is a last decision, which introduced other pre-existing procedures of consultation, management and safeguard. It proceeded to a control regulation, according to art. 5bis, assigning a vote of opposition also to the European Parliament and in measures of general scope intended, as amendments to non-essential elements of an act adopted according to the procedure, that was based on the procedure of Art. 251 of the Treaty, which included co-decision (Kellerbauer, Klamert, Tomkin, 2024).

Both included new non-essential elements since the “essential elements of a legislative act can only be modified by the legislator on the basis of the Treaty”.¹¹

The acts of approval are like the regulatory procedure with scrutiny, which corresponded in current delegated acts without formal qualification having autonomy and legal basis in the Treaties (Piris, 2006).¹²

⁸887/373/EEC: Council Decision of 13 July 1987 laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ L 197, 18.7.1987, p. 33-35.

⁹1999/468/EC: Council Decision of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ L 184, 17/07/1999, p. 23-26.

¹⁰2006/512/EC: Council Decision of 17 July 2006 amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ L 200, 22.7.2006, p. 11-13.

¹¹Recital 7 of 2006/512/EC: Council Decision of 17 July 2006 amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission, op. cit.

¹²Piris affirms that: “(...) the expression “implementing powers” has combined two types of power which are different in nature: the power to adopt a normative act which amends or supplements the basic legislative act itself (...) or to execute at EC

The Treaty of Lisbon distinguished between delegated acts and implementing acts, also providing for different requirements for their adoption and different procedures and forms of control, given that delegated acts performed legislative functions and affected a horizontal distribution of powers of the European institutions.

However, they were subject to *ex ante* limits identified by their own legislator regarding the duration and scope of the delegation, as well as controls by the legislator itself. Relative controls provided for in the basic legislative act and objections to the content of the delegated act without corrections until the revocation of the delegation by the European Commission, are based on Art. 290, par. 2 (Peers, Costa, 2012).

Art. 290, par. 2 TFEU affirms the conditions to which the delegation is subject. These are the following:

“(a) the European Parliament or the Council may decide to revoke the delegation; (b) the delegated act may enter into force only if no objection has been expressed by the European Parliament or the Council within a period set by the legislative act”.

The European Parliament decides by qualified majority to obtain the aforementioned conditions (Kellerbauer, Klamert, Tomkin, 2024).

Furthermore, according to Art. 238 par. 2

“where the Council does not act on a proposal from the Commission or from the High Representative of the Union for Foreign Affairs and Security Policy,

level, all or part of a legislative act, on the other hand Legal Instruments (...)”.

the qualified majority shall be defined as at least 72 % of the members of the Council, representing Member States comprising at least 65 % of the population of the Union”.

Continue in par. 3 regarding transitional provisions

“in cases where, under the Treaties, not all the members of the Council participate in voting, a qualified majority shall be defined as follows: A qualified majority shall be defined as at least 55 % of the members of the Council representing the participating Member States, comprising at least 65 % of the population of these states. A blocking minority must include at least the minimum number of Council members representing more than 35% of the population of the participating Member States, plus one member, failing which the qualified majority shall be deemed attained”.

Therefore, in this case the Council

“does not act on a proposal from the Commission or from the High Representative of the Union for Foreign Affairs and Security Policy, the qualified majority shall be defined as at least 72 % of the members of the Council representing the participating Member States, comprising at least 65 % of the population of these states”.

The powers of the Union and of the Member States have a vertical impact on implementing acts. Both are responsible for implementing acts, based on control mechanisms, according to Art. 291 TFEU (Kellerbauer, Klamert, Tomkin, 2024), i.e. by a regulation approved, through the ordinary legislative procedure, by the European Parliament and Council. A regulation approved in 2011,¹³ which confirmed committees composed of state representatives.

As regards the procedure for approving implementing acts, the regulation has simplified the previous framework of providing

¹³Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers, OJ L 55, 28.2.2011, p. 13–18.

for two procedures (Chamon, 2016)¹⁴. In particular, Regulation no. 182/2011 automatically aligns the implementing acts and the previous regime of the new procedures. This is not a general alignment. In fact, it provides for acts, that according to the regulatory procedure fall within a scope of application of comitology.

A consultative procedure, that the committees call and express their non-binding and examination opinions. In the case of negative opinions of the committee there is a risk of paralyzing the adoption of the executive act.

This distinction between delegated and implementing acts was made by the European Commission, which wanted to reduce the scope of action of comitology in favor of the Union. The actors of this action were the European Parliament, the European Commission, the Council, i.e. the bearers, who respected the supranational interest for the citizens and the Member States.¹⁵

A precise application

The innovations introduced and started already in 2001 were focused on the continuous debates regarding the role of the European Parliament. More precisely, on the decision-making

¹⁴Understanding Delegated and Implementing Acts of 7 July 2021: [https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI\(2021\)690709](https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2021)690709) (Accessed on 10.09.2025).

¹⁵European governance-A white paper /COM/2001/0428 final/OJ C 287, 12.10.2001, p. 1-29.

process of the European Parliament that would have improved the democratic character of the European institutional structure. The issuing of all the acts of the second and third pillar was linked to their unification under categories, namely regulations, directives and decisions.

Furthermore, a distinction was introduced between legislative and non-legislative acts, between delegated acts and implementing acts. This is a structured system that has abolished the laws, framework laws, that were presented with the constitutional treaty (Dubout, 2021)¹⁶ and have become subjects of referendum from France and Holland since they looked “like the legal instruments of a European super-state” (De Witte, 2008).

A referendum that made the situation even more confusing by abstracting regulations, directives, decisions of a legislative nature, regulations, directives, decisions of a delegated nature and regulations, directives, decisions of an executive nature (Blanchet, 2011). The European Parliament was the winner of the final reform. It has been the institutional balancer since the Treaty of Lisbon and then, respecting the previous treaties.

The European Parliament, as co-legislator in ordinary way

¹⁶The Constitutional Treaty abolished the directives and followed the path of European framework laws, that is, legislative acts, European regulations that have not assumed delegated, implementing regulations. In both cases the nature is not legislative and the European decisions could have the character of implementing decisions, as well as opinions, recommendations, non-binding acts based on Articles I-33-I-37.

together with the Council, approved more than 400 acts with the co-decision procedure, in the IX legislature. This is a number that indicates a continuous growth, which respects the previous legislature.¹⁷

The appeals promoted by the European Parliament before the CJEU challenged the legal basis for the adoption of an act, which provided for the co-decision procedure in defense of prerogatives and in the face of a conflict, that in reality has disappeared.

The powers of the European Parliament had always been the object of doubts and criticisms and the procedure to be followed in substance for the approval of the acts became the object of interinstitutional negotiations. It should be emphasized, that the legislative procedure in itself modifies the rule by arriving at a conciliation phase, which has disappeared in the majority of cases concerning proceedings concluded already with the first reading.¹⁸

This happens because there are no time limits in the legislative process and it usually ends in various stages, that see trilogues, informal negotiations between representatives of the European

¹⁷Activity Report. Developments and Trends of the Ordinary Legislative Procedure, 2 July 2019-15 July 2021: https://www.europarl.europa.eu/cmsdata/289669/1305846_EN.pdf (Accessed on 10.09.2025).

¹⁸Ordinary Legislative Procedure Files of 26 July 2024, concluded since the entry into force of the Treaty of Amsterdam: https://www.europarl.europa.eu/EPRS/Ordinary_legislative_procedure_poster.pdf (Accessed on 10.09.2025).

Parliament, the Council and the European Commission being the protagonists of the co-decision offering greater transparency and accountability in practice.

The European Parliament has had broad and varied powers of control over all delegated acts and to their adoption. The states, in such a way, lose the power to influence their own committees, on implementing acts.

The European Parliament has not exercised its power of revocation and has raised formal objections mainly due to the failure to comply with conditions, which are indicated in the legislative act and the exercise of the delegation, to the unsuitability of the delegated act pursuing the objectives requested by procedural defects, in an effective manner and carrying out a control, which the European Commission itself suggests.

A control that lead to the interinstitutional agreement entitled: “Legislate better from 2016”¹⁹ through observations, comments, recommendations, suggestions, which are usually included in the final text.²⁰ This is an observation, which in practice has and brings a balance in abstract under various profiles.

¹⁹Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making, OJ L 123, 12.5.2016, p. 1–14

²⁰European Parliamentary Research Service, Parliamentary Scrutiny of the European Commission: Implementation of Treaty Provisions. European Implementation Assessment update, pp. 73-80: <https://op.europa.eu/en/publication-detail/-/publication/ac5c66d5-be3d-11e9-9d01-01aa75ed71a1> (Accessed on 10.09.2025).

From an internal point of view, the concept of hierarchy continues and is foreign to the system of sources derived from the Union. The hierarchy between directives, regulations and decisions refers to a subordination of non-legislative acts to legislative ones.

The executive act is subordinate to the act, that is executed without necessarily being a legislative act. The delegated act respects the essential elements and other precise requirements of a legislative act, which confers the delegation.

The delegated act is based on Art. 290 TFEU (Kellerbauer, Klamert, Tomkin, 2024). It has the power to amend the delegating legislative act, as an integral part, that prevails from its own provisions relating to non-essential elements.²¹

The CJEU has accepted, under various circumstances, an executive act, which derogates the legislative act.²² There are acts that are not legislative, delegated, executive, according to Art. 290 and 291 TFEU (Kellerbauer, Klamert, Tomkin, 2024), thus defining their own hierarchy and decisions in the field of the CSDP. The system of sources, which are derived from the

²¹A delegated act actually modifies several elements that are not essential to the legislative act. The text to a consolidated version modifies amendments that are introduced by the related delegated text. The delegated act provides for the related integration of the basic act and that remains separate from the latter.

²²CJEU, 6 September 2017, joined cases C-643/15 and C-647/15, Slovak Republic and Hungary v. Council, ECLI:EU:C:2017:631, published in the electronic Reports of the cases, par. 78: “(...) It must be acknowledged that temporary measures adopted on the basis of Article 78(3) TFEU may in principle also derogate from provisions of legislative acts; such derogations must nevertheless be limited in terms of their scope of application, both substantive and temporal (...)”.

Union, come out from the ordinary system. In this way, the so-called “nothing is more complicated than simplification” (De Witte, 2008) is satisfied with the relative progress that exists.

The distinction between legislative and non-legislative acts is of a procedural nature. In this way, legislation is qualified in terms of its content. In this way, some essential and not elements of the relevant act are created and identified, through the distinction of difference, that is based on Art. 290 TFEU (Kellerbauer, Klamert, Tomkin, 2024).

The first distinction concerns a monopoly of the legislator. The essentiality of the discipline substantially distinguishes the legislation. Essentiality is referred to as a reserve of law, that surrounds essential and factual elements, which highlight fundamental orientations for the policies of the Union. In this way, a more political and less legal scope is attributed.

More precisely, it is stated that:

“(...) elements of doctrine protects the principle of democracy and the rule of law (...) through horizontal and vertical allocation of powers within the Union legal system (...)” (Türk, 2020).

The character of essentiality is difficult to be precisely defined.

The CJEU attempts to provide criteria to verify an element that is considered essential. The presupposition of the relative

“(...) identification of the elements of a matter that must be qualified as essential (...) are the objective elements that can be subjected to judicial review and imposes (...) the characteristics and peculiarities of the sector under examination (...)”²³ provisions whose adoption requires political choices

²³CJEU, 10 September 2015, C-363/14, Parliament v. Council, ECLI:EU:C:2015:579, published in the electronic Reports of the cases, par. 47.

falling within the responsibilities of the Union legislator that cannot be the subject of a delegation (...)”²⁴ essential elements, just as essential are the provisions that have as their object the translation of the fundamental guidelines of Community policy (...)”²⁵

It is clear, that these attempts before the CJEU stop at a general, abstract level. Such attempts are not, however, useful to provide clear parameters. The distinction between delegated and implementing acts, according to Art. 290 and 291 TFEU, in practice trace the difference between the function of integration for delegated acts and the implementation of executive acts (Spasova, 2021).

The CJEU has underlined the relative power to decide by making use of Art. 290 and 291 TFEU (Kellerbauer, Klamert, Tomkin, 2024).²⁶ The judicial review, thus, limits the cases of manifest error and assessment.²⁷ In 2019, an interinstitutional agreement between the European Commission and the Council, identified the criteria that are oriented in the choice between delegated and implementing acts.²⁸ These are varied and not

²⁴CJEU, 5 September 2012, C-355/10, *Parliament v. Council*, ECLI:EU:C:2012:516, published in the electronic Reports of the cases, par. 65.

²⁵CJEU, 27 October 1990, C-240/90, *Federal Republic of Germany v. Commission*, ECLI:EU:C:1990:408, I-05383, par. 37.

²⁶CJEU, 18 March 2014, C-427/12, *Commission v. Parliament and Council*, ECLI:EU:C:2014:170, published in the electronic Reports of the cases, par. 40; 16 July 2015, C-88/14, *Commission v. Parliament and Council*, ECLI:EU:C:2015:499, published in the electronic Reports of the cases, par. 28.

²⁷CJEU, 18 March 2014, C-427/12, *Commission v. Parliament and Council*, ECLI:EU:C:2014:170, published in the electronic Reports of the cases, par. 40.

²⁸Non-Binding Criteria for the application of Articles 290 and 291 of the Treaty on the Functioning of the European Union — 18 June 2019, (2019/C 223/01): <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ%3AC%3A2019%3A223%3AFULL> (Accessed on 10.09.2025).

exhaustive criteria, qualified as non-binding.

The use of Art. 290 and 291 TFEU continues to be a battleground between the European Commission, the Council and the European Parliament once it deals with the negotiations of activities between the trilogues (Kellerbauer, Klamert, Tomkin, 2024).

Art. 290 TFEU undoubtedly defines delegated acts in a comprehensive manner. It removes, therefore, them from the comitology regime. After the entry into force of the Treaty of Lisbon, the implementation of delegated acts after their adoption is officially communicated to the

“(...) experts of the individual national authorities (...) providing the Commission with a useful and effective contribution. In this regard, the Commission may set up expert groups or make use of groups already established (...)”.²⁹

A position that is based on the interinstitutional agreement of 2016 entitled: “Better lawmaking”.³⁰ The committees composed of representatives of the Member States maintain a role relating to the approval procedure of delegated acts and in the less institutionalized capacity for expert committees, creating, in such a way, a type of expertology.³¹ The representatives of the

²⁹Communication from the Commission to the European Parliament and the Council - Implementation of Article 290 of the Treaty on the Functioning of the European Union, /*COM/2009/0673 final*/, pp. 6-7. Common Understanding on Delegated Acts, 10 April 2011, 8753/11, PE 164: <https://publications.parliament.uk/pa/cm201012/cmselect/cmeuleg/428-xxxiii/42812.htm> (Accessed on 10.09.2025).

³⁰Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making, op. cit.

³¹Common Understanding on Delegated Acts, 10 April 2011, 8753/11, PE 164,

Member States, through the expert committees, are the same ones, who also take part in the comitology committees and who coincide with those, who take part in the working groups of the Council, thus bringing about a novelty of a scaled-down and transformed type, introduced by the Treaty of Lisbon.

Directives and their direct effect

Some changes have occurred after the Treaty of Lisbon, which has put the institutional organization in relation with the law of the Union and the internal law of the states with the direct effect of representation. We can note principles of a federal nature of the Union, which are introduced by the CJEU in jurisprudence, attributing greater relevance to the law of the Union. The direct effect appears to be provided in the national legal systems for the states. It is also the object of the following analysis.

Direct effect comes from the *Van Gend en Loos* judgment of 1963 and then continued more extensively with the *Van Duyn* judgment (Bailleux, 2019; Seidel, 2023).³² In this way, direct effects are produced recognizing provisions of the treaty for directives and precise conditions.

Direct effect contains obligations for the states in an absolute and unconditional manner, also requiring “its very nature, any implementing measure by the Community institutions or the

op. cit.

³²CJEU, 4 December 1974, C-41/74, *Yvonne van Duyn v. Home Office*, ECLI:EU:C:1974:133, I-01337.

Member States”. It is a deadline established for its implementation in time.

Direct effect after the Van Duyn case has allowed the CJEU to exclude, that directives are unconditional and precise having as direct effect horizontal relationships between private subjects. Furthermore, the ratio and the foundation proposed by the mechanism were highlighted on some important points. These are highlighted by the CJEU, namely: - to exclude as incompatible the binding effectiveness of directives; -the useful effect of these instruments would be weakened if they are precluded to individuals from applying them before national judges; and -it is a question of a preliminary reference arising even if it is susceptible and invoked before national judges.³³

This is an exclusion, that is aware of the difference of Art. 288 TFEU between regulations and directives, thus, attributing a direct applicability (Kellerbauer, Klamert, Tomkin, 2024).³⁴ In this way, a direct effect is configured, as a sanction, that is addressed precisely to the Member States, that are guilty of not correctly transposing the directive into domestic law. The CJEU stated, in this regard, that

³³CJEU, 4 December 1974, C-41/74, Yvonne van Duyn v. Home Office, op. cit., par. 9.

³⁴CJEU, 14 July 1994, C-91/92, Paola Faccini Dori v Recreb Sri, ECLI:EU:C:1994:292, I-03325, par. 24: “(...) to extend this case law [on direct effect] to the sphere of relations between individuals would mean recognising that the Community has the power to issue provisions which give rise with immediate effect to obligations for the latter, whereas such competence belongs to it only where it is granted the power to adopt regulations (...)”.

“(…) a Member State which has not adopted (…) implementing measures imposed by the directive cannot rely on individuals for failure to fulfil (…) the obligations arising from the directive itself (…)”³⁵ (so-called estoppel clause) the binding nature of the directive on which the possibility of enforcing it before the national court is based exists only with respect to the Member State to which it is addressed (…) the directive cannot in itself create obligations for an individual and that a provision of a directive cannot therefore be enforced as such against the individual (…)”.³⁶

With the Ratti case³⁷ the CJEU relied on further logics of its mechanism, that differently from the Member States ended up with an advantage due to non-compliance, thus, reducing the mechanism of direct effects to have a sanctioning, pedagogical nature.

The direct effects of the directives could, thus, exclusively call the scope of vertical litigation, that are part of a state and to an individual without inter-individual relationships. It also functions against the state making it impossible for the administrations to called to their private individuals.³⁸ All this,

³⁵CJEU, 5 April 1979, C-148/78, Ratti, ECLI:EU:C:1979:110, I-01629, par. 22. 19 January 1982, C-8/81, Ursula Becker v Finanzamt Münster-Innenstadt, ECLI:EU:C:1982:7, I-00053, par. 24.

³⁶CJEU, 26 February 1986, C-152/84, M.H. Marshall v. Southampton and South-West Hampshire Area Health Authority (Teaching), ECLI:EU:C:1986: I-00723, par. 48-49: “(…) where citizens are able to enforce a directive against the State, they may do so regardless of the capacity in which the latter acts as an employer or as a public authority (…) to prevent the State from taking advantage of its failure to comply with Community law (…) as an estoppel argument: a Member State which has failed to fulfil its obligation to transpose a directive cannot invoke its own failure to fulfil its obligations as a defence and individuals have the right to rely on the provisions contained in that directive against the State (…)”.

³⁷CJEU, 5 April 1979, C-148/78, Ratti, op. cit., par. 24: “(…) that extending the jurisprudence on direct effects to the sphere of relations between individuals would mean recognising that the Community has the power to issue rules which give rise to obligations with immediate effect for the latter, whereas such competence belongs to it only where it is granted the power to adopt regulations (…)”.

³⁸CJEU, 11 June 1987, 14/86, Pretore di Salò/X, ECLI:EU:C:1987:275, I-02545;

taking into consideration, that the directive initially binds only the Member States without creating obligations for individuals. This means that it makes no sense to address sanctioning logics towards subjects extraneous to the relative obligations, which implement this type of acts in the secondary law.

The no horizontal direct effect rule relating to directives justifies produces problematic and paradoxical results. The unconditional, precise directive is suitable to produce direct, general and precise effects if not invoked by an individual against the state and not against another individual. Using horizontal relationships finds application within the domestic legislation of an incompatibility with the European one.

The consequences to the substantial situations are identical and governed by the different regulations, that are in conflict with each other (Dashwood, 2007). The CJEU has developed over the years various escamotages for this rule, that has introduced and expanded the notion of public authority also including the concept of the state to subjects of public law, which are deprived of the power to transpose directives into the domestic system.³⁹

³⁹ 8 October 1987, 80/86, Kolpinghuis Nijmegen, ECLI:EU:C:1987:431, I-03969; 26 September 1996, C-168/95, Arcaro, ECLI:EU:C:1996:363, I-04705; 3 May 2005, C-387/02, C-391/02 and C-403/02, Berlusconi and others, ECLI:EU:C:2005:270, I-03565.

³⁹CJEU, 26 February 1986, C-152/84, M.H. Marshall v. Southampton and South-West Hampshire Area Health Authority (Teaching), op. cit., 10 October 2017, C-413/15, Elaine Farrell v. Alan Whitty, Minister for the Environment, Ireland, Attorney General, Motor Insurers Bureau of Ireland (MIBI), ECLI:EU:C:2017:745, published in the electronic Reports of the cases, par. 28: “(...) directive has been considered opposable to those private law entities that are endowed with powers that exceed the limits of those resulting from the rules that apply in relationships between

Thus, an obligation is introduced to national judges for the states in order to interpret national law in a manner compliant with the European one (Bobek, 2020).⁴⁰ This is the name given to horizontal relationships for directives, that are part of the non-application of a state discipline, that conflicts with real obligations, that are unfavourable for private individuals (Arnull, 1999; Dougan, 2007).⁴¹

This jurisprudence reaches a path that finds space in the Mangold judgment (De Mol, 2010)⁴² and then in the Küçükdeveci⁴³ and Dansk Industri⁴⁴ decisions, thus recognizing the direct effect of the general principle of non-discrimination on the basis of age. The CJEU, through the Directive 2000/78 EU, stated that

“(...) the principle of equal treatment in matters of employment and work (...) finds its source in various international instruments and in the constitutional

individuals (...)”. 11 April 2024, C-316/22, Gabel Industria Tessile SpA, Canavesi SpA v. A2A Energia SpA, Energit SpA, Agenzia delle Dogane e dei Monopoli, ECLI:EU:C:2024:301, published in the electronic Reports of the cases.

⁴⁰CJEU, 13 November 1990, C-106/89, Marleasing SA v. La Comercial Internacional de Alimentación SA, ECLI:EU:C:1990:395, I-04135, par. 8; Faccini Dori, op. cit., parr. 26-27.

⁴¹CJEU, 26 September 2000, C-443/98, Unilever Italia SpA v. Central Food SpA, ECLI:EU:C:2000:496, I-07535m parr. 50-51; 30 April 1996, C-194/94, CIA Security International SA v. Signalson SA and Securitel SPRL, ECLI:EU:C:1996:192, I-02201; 7 January 2004, C-201/02, Wells, ECLI:EU:C:2004:12, I-00723.

⁴²CJEU, 22 November 2005, C-144/04, Mangold v. Rüdiger Helm, ECLI:EU:C:2005:709, I-09981.

⁴³CJEU, 19 January 2010, C-555/07, Seda Küçükdeveci v. Swedex GmbH & Co. KG, ECLI:EU:C:2010:21, I-00365.

⁴⁴CJEU, 19 April 2016, C-441/14, Dansk Industri (DI), ECLI:EU:C:2016:278, published in the electronic Reports of the cases.

traditions common to the Member States⁴⁵ (...) in particular in relation to discrimination on the basis of age (...) considered a general principle of Community law (...) judges have the duty to ensure full effectiveness even by disapplying any contrary provision of national law (...) the deadline for transposition of the said directive has not yet expired (...)” (Muir, 2011; Ziegler, Jennings, Neuvonen, Moreno-Lax, 2022).⁴⁶

In this way, in the direct effect sector of directives, an incoherent framework is reconstructed, in a complete manner, which connects the effect of directives with objective points and characteristics of unconditional clarity in the content and tenor of these. The vertical and horizontal relationship comes into relief, thus ending and taking into consideration the escamotages for the CJEU every time the principle, which founds the legal systems such as that of legal certainty, is compromised, in an irreparable manner.

In sum, it is not possible to give a precise answer whether the innovations introduced and cultivated by the Treaty of Lisbon over time can have precise results for the direct effect of directives and for outcomes, that are connected to and respect legal certainty.

CJEU and direct effect of directives

The horizontal effects of directives for the CJEU is a never-ending reality. We recall the conclusions of the Advocate General N. Emiliou in the *Gabel Industria Tessile e Canavesi*

⁴⁵CJEU, 22 November 2005, C-144/04, *Mangold v. Rüdiger Helm*, op. cit., par. 74.

⁴⁶CJEU, 22 November 2005, C-144/04, *Mangold v. Rüdiger Helm*, op. cit., par. 77-78.

case of 2023.⁴⁷ The conclusions of such case are based, in a traditional way, on the effectiveness of the source of Union law and in a unidirectional way on the process of attribution of subjective legal positions, as a key to an interesting reading. A position that does not take into consideration the state perspective within the general context of the questions, that are raised, in this regard.

The relative uncertainty appears to be understandable in the relationships between the Union legal system and the Member States, within the limits of the principle of primacy of Union law (De Witte, 2021). As stages of European integration and of a policy of evolution of the relationships between legal systems, demonstrate a parallel use of the directive, that extends its effects towards a progression of freedom of states in the implementation of their sovereignty.

The preliminary reference allows the judges of the Union to extend the boundaries of the competences of the Union. The jurisprudential phases of the CJEU, in relation to the directives and through a political comparison of the Union legal system and with state prerogatives, deserve attention on their relationship with state sovereignty within the primacy of Union law.

The effects of the directives seek to delimit the principle of the

⁴⁷CJEU, Conclusions of the Advocate General in case of 16 November 2023, C-316/22, Gabel Industria Tessile and Canavesi, ECLI:EU:C:2023:885, published in the electronic Reports of the cases, par. 1.

primacy of Union law in terms of the relationship between the Union legal system and the individual Member States. The result of two orders of legal systems is based on a systematic balance of an uncertain nature.

The discussion on the primacy of Union law has for years found a definitive answer to the solution of the question of direct effectiveness, i.e. vertical and/or horizontal, of directives, which in a partial way are unsatisfactory to a logic of elastic extension at times, that the effects are necessary in the source of secondary law. This is a dissatisfaction, which from a substantial point of view, brings practical consequences and refers to the relationships between European legislation and individual recipients.

The legal position of the recipients poses interpretative problems to a solution responding to the preliminary question of the limits of primacy and to a relationship between legal systems such as that of the Union and of the state prevailing over each other in the directive in general.

Horizontal effects exist, as rules that deny the principle of the prohibition of horizontal effects, i.e. as an effective axiom of directives. Such an argument is connected with the primacy of a term of thoughts, which stabilizes the logic of a distinction between vertical and horizontal effects within a boundary, which operates within the spirit of primacy, i.e. between Union and

national legal systems.

As a consequence, the substitution effect and the exclusion, which limits the hypotheses of disapplication, are reserved to the provisions of the directives that have direct effectiveness within the scope of a vertical relationship, which does not exclude with an exceptional manner effects for third parties.

It is considered that the Union source seems like a prohibition of horizontal effects. These are effects within the state legal systems operating positively and/or negatively within the primacy of Union law and as a consequence of an effect, which replaces its own exclusion.

All these positions and syllogisms are permitted by reading the judgment of 11 April 2024 in the *Gabel Industria Tessile e Canavesi* case⁴⁸ thus adopting an approach, which finds space in the individual national legal systems, as a justification for horizontal effects of the directives.

Indirect effects of directives and prohibition of horizontal effects

Equal treatment, as a remedy that determines private subjects in relation to the prohibition of horizontal effects and as a declination that reaches the prohibition of affirmation of the principle of compliant interpretation (Niglia, 2022), is followed

⁴⁸CJEU, 11 April 2024, C-316/22, *Gabel Industria Tessile and Canavesi*, ECLI:EU:C:2024:301, published in the electronic Reports of the cases.

by national courts in relation to the attribution of horizontal, indirect, incidental effects, which decline a directive with direct effectiveness, that goes outside the vertical and recipient relationship of the defaulting state, especially, in triangular situations. In this spirit, we recall the Wells case, which states the “negative repercussions”,⁴⁹ as an extension, in a horizontal sense, of the effects of vertical effectiveness.

In other words, these are technical rules regarding the non-application of a national rule and an opposing effect of primacy arriving at a residual right to compensation for damages, deriving from the state's failure to comply. The criticisms linked to the declination of effects, have to do with the application of the directive, that is, a prejudice of individual violations of the prohibition of vertical and horizontal effects.

This is a prohibition, that shows the question of horizontal effects of the directive that is in itself foreign to the law of the Union and does not belong to the autonomy of the Member States. The problem of declination for effects of primacy concerns national political choices and the law of the Union through the relative jurisprudence.

The constraint for the state systems with horizontal effects is recognized on the basis of a right, which is introduced by the states. The criticisms examined, according to the Union law,

⁴⁹CJEU, 7 January 2004, C-201/02, Wells, op. cit., par. 57. 17 July 2008, joined cases C-152/07 to C-154/07, Arcor AG, ECLI:EU:C:2008:426, I-05959, par. 36. 17 December 1970, 33/70, SACE, ECLI:EU:C:1970:118, I-01213.

find in the state system a diversity at the normative level, that is of the same nature of the directive. The direct effectiveness and the prevalence of the law of the Union affect state sovereignty. In such a way, it is attributed to the European system, in an original way, the respect of the traditional international organizations towards the forms of integration.

The negative reactions and the consequences of the affirmation of the primacy of the law of the Union show the existence of subsequent developments. The regulations, the decisions taken into consideration begin with the problem of effectiveness of the European directives, that is, a direct effectiveness similar to the regulations, as we have seen in the SACE case.

The jurisprudence has long sought to equate and extend to directives unconditional and precisely sufficient obligations. Such equating, as a rule of the Union, does not subject to conditions the power of horizontal effects as well as towards subjects other than states, to which subjective rights arise for individuals.

The reactions were unfounded to equate regulations and directives according to the treaties. The direct effect with a unique way and in a vertical sense towards a state is responsible because of the failure to implement the same directive. The horizontal effect prefers among private individuals the recourse to a remedy and a compliant interpretation starting from the

Marleasing case,⁵⁰ as an extreme limit contra legem of a combined effect of directives and general principles. That is a ratio for compensation for the third party, who has suffered damages from this failure, as a trick with evident limits. The impossibility for the CJEU to give a definitive answer on the relative question of horizontal direct effects gives rise to doubts from time to time.

The non-homogeneous nature of the directives results from the effects of the category they are part of. We appreciate the effort of systematic construction, that places the perspective of the primacy of the law of the Union, at the national level by determining the boundaries of application, according to the expansive terms relating to the sovereignty of a supranational order, which concerns the national ones. Without obviously leaving out the compliant interpretation between positions of act, which avoid direct clashes.

The framework of relations between legal systems has horizontal effects, that include the primacy of the law of the Union as well as the direct effect, that has destined and avoided the application of a national norm, as an oppositional effect without the realization, that replaces the national norm with that of the Union, i.e. the substitutive effect.

The CJEU has asserted between private individuals effects of disapplication of the national norm for contrast with the Union

⁵⁰CJEU, 13 November 1990, 106/89, Marleasing, op. cit.

discipline, according to the rules and triangular situations.

As a reference and starting point is the jurisprudence of the CJEU through the *Gabel Industria Tessile e Canavesi* case. This case has opened the way for a vertical effectiveness for the directives. Furthermore, through this case, the same Court has attributed to the excise duties in energy matters.

Excise duties, that have been collected by the supplier on behalf of a financial administration. The horizontal effectiveness of the directives is applied in the internal legislation, that is compliant for the interpretative judgments even if the letter of the rule seems to be opposed.

According to the author's opinion, the horizontal effects of directives are not in competition with the legal systems, due to the prevalence of mutual delimitation of the exercise of sovereign powers as competences of the Union and of its Member States. It is confirmed, that for each Member State the extension of horizontal effects of its own directives is decided.

The CJEU with the judgment of 11 April 2024, in the *Gabel Industria Tessile e Canavesi* case, clarifies the previous judgment of *Thelen Technopark Berlin* of 18 January 2022.⁵¹

The Union cannot claim, within national legal systems, its own effects of acts, i.e. directives for which the Treaties have not attributed the relevant competence. The states are in principle

⁵¹CJEU, 18 January 2022, C-261/20, *Thelen Technopark Berlin*, ECLI:EU:C:2022:33, published in the electronic Reports of the cases.

free to recognize for the acts of the Union effects that are not theirs.

In this spirit, the Advocate General N. Emiliou has tried to respond respecting, what is required by the law of the Union. As well as the provision of a national law, that conflicts with the precise and unconditional provision of a directive, which does not implement for the plaintiff his own rights attributed by the same directive.

The principle of effectiveness hinders national legislation, that does not allow and does not directly request the state to reimburse an undue tax but only recognizes the possibility of proving a civil action, which repeats against the supplier the methods that it has had the opportunity to specify.

The Advocate General has tried to move away from the old jurisprudential orientation, which excluded the horizontal effect, thus highlighting the opportunity to provide clarifications in a way, that the negative consequences lack the direct horizontal effect, that it produces and according to the conclusions of the Advocate General Emiliou did not apply the provisions of a directive, that was not implemented to a dispute between private individuals.

Also in the Thelen Technopark Berlin case it was affirmed, that the national judge are based on the law of the Union and disapply

“(...) a provision of his national law contrary to a provision of the law of the

Union, in case this last provision has not direct effect (...) the possibility, for such judge (...) to disapply, on the basis of internal law, any provision of the national law contrary to a provision of the law of the Union is out if efficacy (...) the law of the Union does not impose on national judges to disapply national provisions in contrast with Union dispositions without effects in disputes with private individuals (...) prevents national judges from proceeding in this way if national law so provides (...).⁵²

Only national judgements are based on the law, which attributes horizontal effects to the directive. It does not object that such an extension has direct effects. The horizontal direct effect of the directives includes the margin of manoeuvre for the states to implement the law of the Union in a logical way without giving up related prerogatives.⁵³

The treatment of individuals and the failure to transpose the directives create situations of inequality at the level of the Union, as well as at the national level. The clarifications offered by the referring court were not precise and the characteristics of national law returns the taxes, which in an undue way are collected by the jurisprudence of the CJEU, according to the application of the principle of effectiveness, which is up to the national judge to control the procedural methods making as “impossible or excessively difficult, for the consumer, to obtain the refund of the tax unduly paid”⁵⁴.

⁵²CJEU, Conclusions of the Advocate General N. Emiliou in case Gabel Industria Tessile and Canavesi, op. cit., par. 21.

⁵³CJEU, Conclusions of the Advocate General Kokott of 14 December 2023, C-626/22, Ilva and othes, ECLI:EU:C:2023:990, published in the electronic Reports of the cases, par. 63

⁵⁴CJEU, Conclusions of the Advocate General N. Emiliou in case Gabel Industria Tessile and Canavesi, op. cit., par. 62.

The CJEU followed a path that motivated and included a solution that already existed and was brought to hand. More precisely, the Union did not claim to impose effects on acts, i.e. directives within national legal systems, which the treaties do not attribute competences and the states are in principle free to know acts of the Union with further effects. The CJEU has not transposed a directive in a precise and unconditional manner but only in a precise manner

“(...) be relied upon by an individual against another individual (...) not by Union law, but by national law, and does not constitute an obligation additional to those provided for by that law (...)”.⁵⁵

As also in the Thelen Technopark Berlin case, which stated that in

“(...) Union law, a directive cannot, in itself, create obligations for an individual and therefore be relied upon (...) against that individual before a national court, a Member State may however confer on national courts the power to disapply (...) any provision of national law, which is contrary to a provision of Union law and has no direct effect (...)”

Some answers on the issue of horizontal effectiveness from national law

The possibility of attributing a horizontal effect in the dispute between private individuals is found exclusively in national law. The Union, through the jurisprudence of the CJEU, recognizes the vertical effectiveness to a line of demarcation, that in reality is configured by the states. Nothing is prevented from recognizing direct horizontal effects to a directive, that is

⁵⁵CJEU, Conclusions of the Advocate General N. Emiliou in case Gabel Industria Tessile and Canavesi, op. cit., par. 23.

endowed with direct effectiveness.

The judge, thus, through national rules of interpretation allows a broader interpretation that is in accordance with the national legislation. It, precisely, ensures the effective jurisdictional protection, that overcomes the obstacle, that uses the judgments of interpretation by way of a preliminary ruling of the CJEU.

The hermeneutic reasons make the national jurisprudence, especially, in the tax sector to invoke the principle of effectiveness for the intended jurisdictional protection, which strengthens the obligation of an interpretation of a national legislation in accordance with the law of the Union, without having scruples of connection with incriminated norms. Thus, Union law presents itself, as an instrument to national law, which remedies the imbalances between legal positions for private parties regarding the failure of the state to fulfil its obligations. In such a way, the state differentiates its position by asking for an effective justice that overcomes by way of interpretation the absence of the horizontal effectiveness of the directive according to the Union legal system.

The national and/or Union legal system to a competitive challenge of its respective competences, seeks to regulate the horizontal effectiveness of directives based on the theory of the estoppel, that is, the vertical direct effectiveness. In this way, national law is pushed discreetly to recognize effects of a

horizontal nature for hermeneutic resolution tools, which the legal system itself knows.

Horizontal effects are not dependent on the legal system that knows them. Horizontal effects are not based on the prevalence of one legal system over another but on the primacy of a direct effect in principle to the exceptions, which come from the jurisprudence of the CJEU. This is a question of domestic law, which is connected to the discipline in the case in question.

This is a position based on the relationship of a unilateral vision of the primacy of Union law, that incidentally affirmed what the CJEU reported in the Thelen Technopark Berlin case, namely the usable result of a subversion that provides a remedy.

The CJEU was careful to respect the competences, which have to do with some issues of difficult interpretation entrusted to the custody of judges of the CJEU. This is an approach, that admits the same direct effects outside the exceptional hypothesis, which unduly attributes to the national judge the power to extend the relative effects for acts of the Union, which go above the limits proposed by the treaties themselves. Since the rule of secondary law does not produce horizontal effects, it is national law that recognizes the rule of different effects, which respect and delimit the Union order.

Over the years, the law of the Union has created a sort of national competences, which no one owns within the boundaries

between different legal systems, that are revealed in situations such as the source of the legal positions of private individuals as well as the relationships that are connected with directives, that are not transposed by the law of the Union as well as negative repercussions, that follow the non-application of a directive to a vertical relationship.

The judge uses instruments, that are recognized at a national level and extended to inter private effects. The jurisprudence forms with additional way for excise duties a contradictory but also unconscious modus of proceeding. This demonstration is evident in the sentences after the Gabel Industria Tessile and Canavesi case. The new jurisprudential path of the CJEU refers to decisional objectives, which recall a previous address, that the general effect of the interpretative sentences are attributed to a horizontal effectiveness.

The vertical nature of the financial administration relationship and the provider of knowledge incidentally and on the occasion of a recovery action within the scope of disapplication, lead to consequences between private individuals and to the principle of effective and compliant interpretation, that lays the foundations for various interpretations (Peers and others, 2021).

The judges of the CJEU needs time towards a new perspective, which is received through various solutions, which are brought back to unity and with reference to legitimacy. This is a problem

that has not resolved the recognition according to the principle of effectiveness, of the admissibility of a direct action by the consumer and against a financial administration.

The judge considers the object of an indirect effect of a national rule to the community one, that ascertains incidentally the recovery judgment, that appears as a triangular situation. The interpretation of the national legal system as a whole includes the principles of derivation of the Union, which are an integral part and allow the boundaries of the obligation of a compliant interpretation, that has been imposed by Union law, as a disapplication of art. 6, letter., which conflicts with Directive 2008/112/EC and according to the CJEU leads to erga omnes effects. The circumstances of a single case lead to the prohibition of horizontal effects and has fallen definitively.

Effectiveness and jurisdictional remedies

The CJEU has observed and fulfilled the case of reimbursement of additional excise duties legitimizing the jurisprudence, that consolidates and extends the relationship between private individuals for the effects of the directive. It has judged, in a contrary way, the principle of effectiveness for jurisdictional remedies. In such a way, it directly prevents the financial administration for the relative reimbursement in question.

The decisions of the Kirchenberg judges have acknowledged the position of the CJEU, as a consequence of the possibility of acting in a direct manner against the financial administration, which is often considered.

The ongoing judgment appears as an abandonment, by the CJEU, of a path that follows the Union law. In this way, we speak of direct exclusion of the reimbursement action. It has also operated without taking in consideration the principle of fair trial and those, who have trusted the consolidated interpretation applied to the new orientation of a procedural situation, that precludes the possibility of a judgment.

The new pending civil proceedings before the tax judges open new perspectives. If the supplier, for example, of energy does not oppose the applicant of illegitimacy, he declares the principles set forth by the CJEU, within the legislation, that excludes the direct route of a refund requested by the financial administration with advantage to the same supplier and without causing damage to the user.

In this spirit, the CJEU in the Danfoss case⁵⁶ has affirmed for the final consumer a previous orientation of the jurisprudence, which ceases its declaratory judgment. There are no grounds for exclusion, that configure the hypothesis, that acts against a

⁵⁶CJEU, 20 November 2011, C-94/10, Danfoss, ECLI:EU:C:2011:674, I-09963, par. 28.

financial administration and/or against the supplier, leaving the consumer the possibility of choosing the different terms of prescription, such as a legislative or jurisprudential change.

The principle of effectiveness is considered legitimate given, that the refund action seeks to experience with direct manner against the customs and monopolies agency. The final extraordinary legitimacy against a treasury resorts to an objective undue action.

The reimbursement action concerns a difficult supplier. As for example, the relative principle, in the Gabel Industria Tessile and Canavesi case, which referred to the impossibility for the final consumer to invoke for the supplier the horizontal energy in the directive implemented late by the state without controlling such excessive difficulty.

Perhaps for reasons of procedural economy the civil judgment between the final consumer and the supplier excludes the possibility, which has to do with the non-application of a state rule of a conflicting nature with the Union law, that carries out the relationship with the supplier and the state authority, admitting, in this way, the effectiveness of the directive, the relationship between private individuals and its exclusion from Union law.

The case law on the *Gabel Industria Tessile e Canavesi* ruling clearly does not require further comments since it assumes a direct action against the financial administration, however, the issue of horizontal effects of the directive remains unresolved for the supplier, which presents the presupposition for the same action.

The possibility of taking action against the supplier conflicts with the assertion of impossibility, which invokes horizontal effects and constitutes the relative presupposition for a direct action against the tax authorities. Direct action excludes repetition by the consumer against the supplier.

The application of the principle of effectiveness is oriented towards the recognition of the horizontal effect in the excise sector, representing similar cases in areas of legal system even if the principle of effectiveness does not operate in the same way.

The opportunity to resolve the problem of horizontal effectiveness of the directives overcomes the approach in terms of antinomy between Union and national legal system. It does not prevent national judges from applying the hermeneutic rules that allow an interpretation of a domestic legal system, that extends and allows the application of private and the provisions of the directive, as previously reported.

The case relating to triangular excise duties has some

specificities, which have facilitated the jurisprudence of merit and legitimacy. It is favorable to the taxpayer and to the private individual, the supplier, who creates a relationship affecting the tax as illegitimate.

The law of the Union does not oppose some principles of order and national law, thus recognizing horizontal direct effects to the provisions of a directive (Schütze, 2021). The different types of directives identified to include exceptions to be made with clarifications that are part of the horizontal effects and also exist in each national order of the Member States of the Union.

Scenarios and practice after the Treaty of Lisbon

The innovations introduced after the Treaty of Lisbon allow us to arrive and continue our investigation on the derived sources, as well as on the consequences of a profile, that has not changed anything in the characteristics of the European directives.

The novelty of the Treaty of Lisbon considered the acquisition by the Charter of rights with binding effect according to the former Art. 6 TEU and the related recognition by the CJEU of the direct effect in connection with Art. 21 on the prohibition of discrimination,⁵⁷ with Art. 31, par. 2 on the right of holidays⁵⁸

⁵⁷CJEU, 17 April 2018, C-414/16, Vera Egenberger v. Evangelisches Werk für Diakonie und Entwicklung eV, ECLI:EU:C:2018:257, published in the electronic Reports of the cases. 22 January 2019, C-193/17, Cresco Investigation GmbH v. Markus Achatzi, ECLI:EU:C:2019:43, published in the electronic Reports of the cases

⁵⁸CJEU, 6 November 2018, joined cases C-569/16 and C-570/16, Bauer,

and Art. 47, which highlighted the effective jurisdictional remedy.⁵⁹

It is asked whether these changes to the plan of investigation justify and highlight an important contribution of a substantial and constitutional nature for the reforms, that are introduced in Lisbon in relation to secondary sources. According to Art. 6, par. 1 TEU it is stated that the “legal value of the Treaties” refers to the number of primary sources.

The task of the content for the provisions of the CFREU, with an inevitable way, formulates all the catalogues of rights, that are carried out and are precise to the directives on the matter as well as the function of the dispute in the sphere of application of the law of the Union activates the protection of the CFREU assuming a role that leads to arguments of the CJEU, within a framework that resolves its own examination.

The disputes based on the jurisprudence of the CJEU recognize the direct effect according to the rules of the CFREU and of a horizontal type, as a circumstance, that opens the way towards an evolution of the direct effect of the directives, a precise direction, according to the principle of legal certainty, that also respects the past of the integrative stages even before the Treaty

ECLI:EU:C:2018:73, published in the electronic Reports of the cases. 6 November 2018, C-684/16, Max-Planck-Gesellschaft zur Förderung der Wissenschaften, ECLI:EU:C:2018:874, published in the electronic Reports of the cases.

⁵⁹CJEU, 17 April 2018, C-414/16, Egenberger, op. cit., 15 April 2021, C-30/19, Braathens Regional Aviation, ECLI:EU:C:2021:269, published in the electronic Reports of the cases.

of Lisbon.

The CJEU, through its own jurisprudence, affirms the horizontal direct effect with an unequivocal manner to the provisions of the CFREU, according to articles 21, 31, par. 2 and 47. It has a self-sufficient character in norms, which confer to individuals a right as such that produces effects, that do not require other provisions of national law and/or of the Union with an imperative manner. Reading sentences from the CJEU one notices that the precise weight to the directives of the matters under examination determine and prevail the rights, which are inserted precisely in the CFREU.

For example, in the Egenberger case,⁶⁰ an organisation operates in relation to religious discrimination by trying to call for a job offer from a candidate, who does not belong to an evangelical church. The CJEU asked to verify, in accordance with the German legislation on the matter, the relevant interpretation of Art. 4 of Directive 2000/78,⁶¹ admitting that the religious exemption respects the principle of equal treatment, when the employer is a church, a confessional body, which accepts rigorous objective criteria.

According to Art. 4, the religious requirement is satisfied, which requires the nature of the activity and the context of religion for

⁶⁰CJEU, 17 April 2018, C-414/16, Egenberger, op. cit.

⁶¹Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303, 2.12.2000, p. 16–22.

personal beliefs, as an essential, legitimate element, which justifies the performance of these activities, also taking into consideration the ethics relating to the organisation.

The CJEU, according to Art. 4 of the Directive, has recognised the horizontal right only in Art. 21. The Directive does not establish a principle of equal treatment, which finds its source in other instruments. Note Art. 21 as a self-sufficient provision, which guarantees a right as such without needing to be supplemented in a specific case. It states, in this regard, the following

“(...) take into account, in particular, the balance established between those interests by the Union legislature in Directive 2000/78 (...) determine the obligations resulting from the Charter in circumstances such as those at issue in the main proceedings (...)”.⁶²

Art. 21 merely establishes the relative prohibition of religious discrimination as well as the possibility of a religious exemption of the particular conditions, that it responds to. This prohibition does not come from Art. 21.

The directive has not served to address a profile, according to Art. 21, which does not deal with the interpretation of art. 4, and constitutes according to the judgment a foreseen balance, that forms a guide for the judges of the Member States, who determine obligations, that come from the same CFREU.

The German discipline in the Egenberger case is in conflict with art. 1 since it does not provide for derogations relating to the

62CJEU, 17 April 2018, C-414/16, Egenberger, op. cit., par. 81.

principle of non-discrimination. What interests us was the verification of the German discipline whether it is in agreement with Art. 4 of the directive, constituting an infringement of the right to discrimination.

Equally important is the Bauer case concerning the appeal filed by two widows against the employers of two workers, who refused, under German law, to pay compensation for unused vacation days for their deceased due to the termination of their employment relationship due to death, according to an interpretation of Directive 2003/88.⁶³

In particular, art. 7 was the basis of the judgment of the CJEU. With a broad interpretation of art. 31 and a precise reference to the explanations of the CFREU, it was identified the directive as a source inspired by art. 31 (Guilloud-Colliat, 2020).⁶⁴ Also in this case, the CFREU presents itself as a rule, which needs further clarifications to guarantee its right. The operative part of the judgment in question connects two cases related to the same

⁶³Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, OJ L 299, 18.11.2003, p. 9–19

⁶⁴CJEU, 6 November 2018, joined cases C-569/16 and C-570/16, Bauer, op. cit., parr. 55-56: “(...) Article 31 of the Charter, which, in accordance with the third subparagraph of Article 6(1) TEU and Article 52(7) of the Charter (...) Article 31(2) of the Charter is inspired by Directive 93/104 as well as by Article 2 of the European Social Charter, signed in Turin on 18 October 1961 and revised in Strasbourg on 3 May 1996, and by point 8 of the Community Charter of the Fundamental Social Rights of Workers, adopted at the meeting of the European Council held in Strasbourg on 9 December 1989 (...) as is clear from recital 1 of Directive 2003/88, the latter codified Directive 93/104, and Article 7 of Directive 2003/88, concerning the right to paid annual leave, reproduces exactly the text of Article 7 of Directive 93/104 (...)”.

problem, characterizing the vertical relationship between the parties in the trial and the other the horizontal one.

According to the CJEU, it has been stated that

“(...) the obligation (to grant the benefit of an allowance in lieu of paid annual leave accrued and not taken by the worker before his death) falls on the national court on the basis of Art. 7 of Directive 2003/88 and Art. 31, paragraph 2, of the Charter if the dispute in question (...) is between an employer having the status of a public authority, and on the basis of the second of these provisions if the dispute takes place between the successor and an employer having the status of a private individual (...)”.⁶⁵

Such a distinction, as a parameter of a type of relationship in court and according to art. 31, with a self-sufficient way makes the Bauer case add the content of the directive. According to the direct effect it is noted that:

“(...) horizontal effects of the fundamental right not to be discriminated against (...) were decided on the substance with reference to the directives, while the legal effects were derived from the Charter (...)” (Muir, 2020).

The CFREU constitutes the basis of one of the instruments, which lacks the direct effect of the directive. The CJEU rightly supported and distinguished the existence of the right, which depends on the CFREU, as content and methods of exercise, which are precise directives.⁶⁶ It is explained, that unlike Artt. 21 and 31 of the CFREU, the provisions taken into consideration are devoid of legal effectiveness (Krause, 2021). And it is already art. 27, which states that

“(...) information and consultation must be guaranteed, at the appropriate levels, in good time in the cases and under the conditions provided for by

⁶⁵CJEU, 6 November 2018, joined cases C-569/16 and C-570/16, Bauer, op. cit., par. 92.

⁶⁶CJEU, 6 November 2018, joined cases C-569/16 and C-570/16, Bauer, op. cit., par. 85.

Union law and national laws and practices (...)”.

Thus, the right of workers to information and consultation in their workplaces should be guaranteed, according to the CFREU. The content, methods and exercise thereof are specified.

The CFREU in the AMS case⁶⁷ and in the presence of Directive 2002/14⁶⁸ has recognized the capacity to produce direct effects.⁶⁹

At the same time, the case in question is excluded even if it concerns the horizontal dispute excluding the operation of art. 27, according to the express reference of national and European sources, which specify the established right. Thus, the decision states that the

“(...) literal wording of Art. 27 of the Charter, in order for that article to produce its full effects, must be clarified by provisions of Union law or national law (...) the prohibition, laid down in Art. 3(1) of Directive 2002/14, and addressed to the Member States, of excluding from the calculation of the workforce of an undertaking a certain category of workers, who initially fall within the group of persons to be taken into account for the purposes of that calculation (...) is a directly applicable legal rule, nor can the literal wording of Art. 27 of the Charter (...) be invoked in a dispute, such as that at issue in the main proceedings, in order to conclude that the national rule, which is inconsistent with Directive 2002/14 must be disapplied (...) in combination with the provisions of Directive 2002/14 (...), which is sufficient to confer on individuals a right, which can be relied upon as such, not even a reading of that rule in conjunction with the provisions of the above mentioned directive

⁶⁷CJEU, 15 January 2014, C-176/12, *Association de médiation sociale*, ECLI:EU:C:2014:2, published in the electronic Reports of the cases.

⁶⁸Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community- Joint declaration of the European Parliament, the Council and the Commission on employee representation, OJ L 80, 23.3.2002, p. 29–34.

⁶⁹CJEU, 18 January 2007, C-385/05, *Confédération générale du travail* of 18 January 2007, ECLI:EU:C:2007:37, I-00611, par. 37.

(...) would lead to a different result”.⁷⁰

A precise connection can be noted for the religious exemption through Art. 4 of the directive 2000/78, Art. 21 CFREU and Art. 7 of the directive together with Art. 31 of the CFREU (Kellerbauer, Klamert, Tomkin, 2024).

From the above-mentioned decisions we have understood that the direct effect brings legal consequences, acquired by the CFREU. This is a recognition by the CFREU. The existence of a right, which has direct effect of a horizontal type and determining the obligations of private subjects, as well as the scope of precise obligations determined by the directives, constitute a basis for a future admission of an intertwining, which lives together with the conclusions of the Advocate General Bot.⁷¹ These are referred to the provisions of the

⁷⁰CJEU, 5 September 2019, C-172/18, AMS and others, ECLI:EU:C:2019:674, published in the electronic Reports of the cases, parr. 45-49. 1^o July 2010, C-194/08, Gassmayr, ECLI:EU:C:2010:386, I-06281, par. 48: “(...) having recognised direct effect to Article 11, point 1 of Directive 92/85/EEC in so far as it establishes that pregnant women must be guaranteed the rights connected with the employment contract, including the maintenance of a salary and/or the payment of an adequate allowance in accordance with national legislation and/or practice (...) the reference to national legislation and practice does not affect the precise and unconditional nature of Article 11, point 1, of Directive 92/85 (...) that provision leaves Member States a certain margin of discretion in adopting the methods of its implementation, that circumstance does not call into question its precise and unconditional nature (...) the implementation cannot in any way affect the actual content of the right established by Article 11, point 1, and cannot therefore condition the existence or restrict the scope of that right (...)”.

⁷¹CJEU, Conclusions of the Advocate General Y. Bot of 4 June 2019 in joined cases: C-609/17 and C-610/17, TSN, ECLI:EU:C:2019:981, published in the electronic Reports of the cases, par. 109: “(...) “symbiotic intertwining” between the fundamental right to an annual period of paid leave enshrined in Article 31(2) of the Charter and the secondary Union law which specifies its scope, it is logical (...) that this provision of the Charter and Article 7(1) of Directive 2003/88 should be invoked and interpreted jointly by the Court in order to ensure the effective nature of the right

CFREU, in a self-sufficient and unconditional way.

The recognition of the right to the CFREU and to the directive leads to a constitution, which is covered by the CFREU itself. The conditions are respected, that is the directive, which has as its objective to regulate in a precise way a right, which is established by the CFREU and asks for the relative regulated discipline.

The principle of legal certainty is safeguarded. The result of a complex discipline has normal characteristics to produce direct effects to the advantage avoiding discriminations within guarantees of the law between those, which oppose the public authority and a private subject. It is also admitted the possibility of a general horizontal direct effect to the directives expressing the rights guaranteed by the CFREU and integrated to the parameter in question.

The process followed by the Advocate General Szpunar, in his conclusions, in the Thelen Tecnopark case,⁷² regarding the violation of German law by provisions of Directive 2006/123 that have to do with the domestic market,⁷³ is related to minimum and maximum rates for fees of engineers and architects concerning horizontal disputes. The case law of the

to a minimum period of annual leave of four weeks (...)"

⁷²CJEU, Conclusions of the Advocate General of 15 July 2021, C-261/20, Thelen Technopark Berlin GmbH v. MN, ECLI:EU:C:2021:620, published in the electronics Reports of the cases.

⁷³Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376, 27.12.2006, p. 36-68

CJEU fails to recognize the direct effect of the directives through private entities.

The Advocate General links the directive with the regulation of contractual freedom, according to Art. 16 CFREU (Kellerbauer, Klamert, Tomkin, 2024), which guarantees the freedom of qualified enterprise. This is a self-sufficient provision, according to Art. 16 CFREU (Kellerbauer, Klamert, Tomkin, 2024), which guarantees the freedom of enterprise in a self-sufficient manner, although the protection of this right must be in accordance with Union law as well as with national legislation and practice.⁷⁴ It is concluded that national legislation conflicts with the Directive, which is disapplied according to Art. 16 CFREU (Kellerbauer, Klamert, Tomkin, 2024).⁷⁵

The CJEU did not consider this approach but reiterates, that directives do not have horizontal direct effect. In this regard, the

⁷⁴CJEU, Conclusions of the Advocate General of 15 July 2021, C-261/20, Thelen Technopark Berlin GmbH v. MN, op. cit., parr. 91-93.

⁷⁵CJEU, Conclusions of the Advocate General of 15 July 2021, C-261/20, Thelen Technopark Berlin GmbH v. MN, op. cit., par. 114.

“(...) national court is not required (...) to disapply a provision of its national law, which is contrary to a provision of Union law (...) where the provision has no direct effect (...)” (Miasik, Szwarc, 2021).⁷⁶

It has also been argued, that the CJEU, did not follow the path of the Advocate General, in this regard. Directive 2006/123 was regulated in the national market and bound by Art. 16 CFREU (Kellerbauer, Klamert, Tomkin, 2024).

However, it was not intended to precisely implement the right it protects. The process, through the conclusions of the Advocate General, admits that directives are covered by Art. 16 CFREU concerning internal market matters and the general “no horizontal direct effect rule”, which is connected with the directives and with the inconsistent direct effect (De Witte, 2022).

In the X. case of 20 February 2024,⁷⁷ the dispute based on an action for unlawful dismissal by an employee in Poland after the employer's termination of a fixed-term employment contract without providing any justification for its decision, arose several points of clarification. The Polish law provided for a

⁷⁶CJEU, 18 January 2022, C-261/20, Thelen Technopark, ECLI:EU:C:2022:33, published in the electronic Reports of the cases, par. 33. 24 June 2019, C-573/17, Daniel Adam Popławski, ECLI:EU:C:2019:530, published in the electronic Reports of the cases, parr. 61-62: “(...) it must be emphasised that every national court, called upon to give a ruling within the scope of its own jurisdiction, has, as a body of a Member State, the obligation to disapply any national provision which is contrary to a provision of Union law which has direct effect in the dispute before it (...) a provision of Union law which has no direct effect cannot be relied upon, as such, in the context of a dispute falling within Union law, in order to exclude the application of a provision of national law which is contrary to it (...)”.

⁷⁷CJEU, 20 February 2024, C-715/20, X (Absence de motifs de résiliation), ECLI:EU:C:2024:139, published in the electronic Reports of the cases.

corresponding obligation for employers to provide reasons in the event of termination of employment contracts and indefinite-term contracts.

The Directive 1999/70⁷⁸ and the related Framework Agreement introduced a general prohibition on discrimination against fixed-term workers, which respects permanent workers and those who are comparable. The Court in Krakow asked the CJEU for clarifications on this matter. In this regard,

“(...) clause 4 of the Framework Agreement and the general principle of Union law concerning the prohibition of discrimination (Article 21 of the Charter of Fundamental Rights of the European Union) may be relied upon by the parties to a legal dispute in which both parties are private individuals (...) the aforementioned provisions have a horizontal effect (...)”.

The CJEU did not take a position on the interpretation of Art. 21 CFREU (Kellerbauer, Klamert, Tomkin, 2024). Instead, it relied on clause n. 4 of the agreement and on the possibility of invoking a dispute between private parties.⁷⁹ This provision of the CFREU has also been clarified. In fact, the

“(...) prohibition of discrimination in clause n. 4, point 1, of the framework agreement is nothing but the specific expression of the general principle of equality, which is part of the fundamental principles of Union law⁸⁰ (...) the clause must be understood as expressing a principle of Union law which cannot be interpreted restrictively (...)”.⁸¹

⁷⁸Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP, OJ L 175, 10.7.1999, p. 43–48

⁷⁹CJEU, 20 February 2024, C-715/20, X (Absence de motifs de résiliation), op. cit., par. 32.

⁸⁰CJEU, 20 February 2024, C-715/20, X (Absence de motifs de résiliation), op. cit., par. 43.

⁸¹CJEU, 20 February 2024, C-715/20, X (Absence de motifs de résiliation), op. cit., par. 44.

The CJEU recognised clause n. 4 in itself, which also has direct effect.⁸² It has also been confirmed by case law, that a directive cannot invoke a dispute between private parties by imposing on the national judge an obligation to disapply the relevant internal legislation.⁸³ It seems obvious, that the reformulation of the relevant question in the interpretation of art. 21 does not reveal such a desire and does not address the issue of possible grounds for discrimination, that are part of it.

The CJEU has given an unexpected recognition regarding the obligation to disapply state law to the national judge, as an interpretation of national law, in accordance with European law, without however being possible to implement. This obligation leads to a direct effect, which is recognized, through the CJEU, in horizontal disputes, such as those produced by Art. 47 CFREU (Kellerbauer, Klamert, Tomkin, 2024). In this way, it guarantees the right to an effective jurisdictional remedy given the self-sufficient character and thus recognizing a right as such.⁸⁴

The lack of motivation in the act of termination deprives the CJEU and the employee of important information for the evaluation of opportunities against the employer. In fact, it

⁸²CJEU, 20 February 2024, C-715/20, X (Absence de motifs de résiliation), op. cit., par. 45.

⁸³CJEU, 20 February 2024, C-715/20, X (Absence de motifs de résiliation), op. cit., par., 74-76.

⁸⁴CJEU, 17 April 2018, C-414/16, Vera Egenberger, op. cit., par. 78.

presents a violation of the right as an effective jurisdictional remedy. The submission of an appeal continues to remain abstract. It is the CJEU, which concludes that

“(...) judicial protection for individuals arising from Article 47 of the Charter, in conjunction with Clause 4, point 1, of the Framework Agreement, as regards the right to an effective remedy (...) to disapply Article 30, paragraph 4, of the (Polish) Labour Code to the extent necessary to ensure the full effectiveness of that provision of the Charter (...)”⁸⁵ provision of the Charter/Directive (...) producing direct effects and therefore as a source from which the obligation to disapply domestic law arises (...) combined with (...) Art. 47 and a Directive and the related Framework Agreement which it seeks to implement, which are aimed at improving the quality of fixed-term work by ensuring the application of the principle of non-discrimination (...)”⁸⁶

The conclusions of the Advocate General Pitruzzella have in reality excluded what could be done.⁸⁷

The decision was difficult to evaluate. The precise consequences have built different interpretations. The decision has concerned the problem of discrimination between permanent workers identified in Art. 21, guiding the choice of the CJEU to attribute a combined direct effect with the provision of Art. 47 CFREU

⁸⁵CJEU, 20 February 2024, C-715/20, X (Absence de motifs de résiliation), op. cit., par. 81.

⁸⁶Taking in consideration the Directive 1999/70.

⁸⁷CJEU, Conclusions of the Advocate General Pitruzzella, 30 March 2023, X (Absence de motifs de résiliation), ECLI:EU:C:2023:281, published in the electronic Reports of the cases, 98-100: “(...) both Articles 20 and 21 (on non-discrimination) and Article 30 which protects against unjustified dismissal may be applied (...) the horizontal direct effect of Article 47 (...) this horizontal direct effect has always been recognised in combination with other rights enforceable against a private individual (...) the application of Article 47 of the Charter presupposes that the private individual is the holder of a right or freedom guaranteed by Union law which he can enforce in court (...) when examining whether this provision can be invoked, he checks whether there is a provision of substantive law which, in the specific situation, grants the party in question rights which he can rely on before a court (...) the situation in question must fall within the scope of the Charter (...) that the specific party in question must have a specific right or freedom, protected by Union law (...)”.

(Kellerbauer, Klamert, Tomkin, 2024).

Articles 20 and 21 of the directive are based on the desire to protect the principle of non-discrimination without expressly committing to the objective of the principle of equality and the prohibited factors, as well as to the nature of Art. 20 for which there is no relevant pronouncement.⁸⁸ This attitude has not led to further criticism.

The intention was to provide for a substantive CFREU provision, which has direct effect. This interpretation was in fact for the CJEU a reference to a precise provision from the CFREU, which qualified the principle of equality, as a fundamental principle of Union law.⁸⁹ It has been stated, that the clause of the framework agreement is considered as an expression of a principle of social law of the Union, that has not been interpreted in a restrictive and rigorous way. It is also not acceptable, that the argumentative sentence opened the doors to

⁸⁸CJEU, Conclusions of the Advocate General Pitruzzella, 30 March 2023, X (Absence de motifs de résiliation), op. cit., parr. 71-81: “(...) art. 21 not exhaustive (...) it is possible to consider article 21 of the Charter as a specification of human dignity with which the list of values enshrined in article 2 of the EU Treaty opens. Values which, as the Court has clarified in particular with regard to the “rule of law” and “solidarity”, are not mere political guidelines. Rather, they are endowed with real legal efficacy and are specified in some general principles at the level of primary law itself and then in more detailed rules (...) among the grounds of discrimination covered by article 21 of the Charter there cannot be room for one of a socio-economic nature, such as that which concerns the status of the worker or the type of contractual relationship that binds him to the employer (...) the drafters of the Charter have indicated certain grounds of discrimination, each considering them a specification (“in particular”) of a certain type of discrimination, that, precisely, which attacks human dignity (...)”.

⁸⁹CJEU, 20 February 2024, C-715/20, X (Absence de motifs de résiliation), op. cit., op. cit., par. 43.

an evolution of jurisprudence towards a linear respectful and of legal certainty direction.

According to the CJEU, the right is effective in itself⁹⁰ as a step, that leads to an extension of exceptions of the prohibition of horizontal effect of directives whenever the national measure is in conflict with a directive, which in a peremptory and precise way ends up decreasing the effectiveness of Art. 47 CFREU (Kellerbauer, Klamert, Tomkin, 2024) in horizontal relationships.

A relative development of the direction, with a coherent way of direct effect, is not precise. A directive does not produce direct effects in relationships between private subjects. Such direct effectiveness is not connectable as such with the directive. It is related to Art. 47 CFREU as it has been provided for with the same directive. A similar combination is evident in a frequent way.

Concluding remarks

The new Treaty of Lisbon has shown a proper de-constitutionalization of the Union, that respects a framework that outlines its own past (Kaunert, 2009; Reh, 2009). A Union with a constitution or not goes beyond the well-prescribed limits and objectives by proposing and verifying innovations, which

⁹⁰CJEU, Conclusions of the Advocate General in case of 16 November 2023, C-316/22, Gabel Industria Tessile and Canavesi, ECLI:EU:C:2023:885, published in the electronic Reports of the cases, par. 1.

are introduced directly and indirectly outside the derived sources.

The Treaty of Lisbon has interrupted and explicitly abandoned the old constitutional framework by continuing a new path of constitutionalization, that has traced a process of integration in the initial phases bringing objectives of maintaining a lasting peace in Europe alongside principles, values, that are part of this modern European constitutionalism.

The profiles considered have opened the way to various considerations in this regard. The innovations introduced and connected with secondary sources lay the foundations for the simplification of a system of derived sources and a hierarchy between them. A hierarchy, which increases the role of the European Parliament, as a legislator together with the Council by attributing powers of screening and control on delegated acts of the European Commission, thus, approaching a Union of representative democracy.

The role of the Member States for the European procedures to a process of approval of the implementing acts is the result, which reduces the community method for the adoption of European acts.

The practice of the institutions is formalized by interinstitutional agreements contributing to innovations and profiles, which are interchanged in a context, which dates back before the Treaty of

Lisbon. These are changes of a constitutional nature of the Union.

In this profile, the direct effect brings advantages in terms of coherence to a new legal framework that was introduced from Lisbon, attributing a binding character to the CFREU, which represents a step forward to the constitutional value carried out by its own treaty.

The CJEU has accepted, in an explicit and general way, that the direct effect in horizontal situations comes from a combined provision of the CFREU, which basis the invocation on a right, to the directives that with a precise and exhaustive way of their content exercise a possible reference to provisions relating to the CFREU and to the sources of its own completion, which in practice refers in an evident way to the role that the directive plays and integrates the relative provisions, that it contains.

From X. case many doubtful paragraphs of the judgment are however the basis, that repeats and constitutes further developments. The recognition of the directive by the CFREU is too attractive leading to an exceptional novelty.

Art. 47 CFREU calls the different interpretations and impressions, that are in contrast with each other. The legitimate analysis of the considerations call and provide normative reforms relating to the derived sources.

The profile of the Treaty of Lisbon brings the potential for

further investigations in the constitutional dimension of the Union making the direct effect comprehensible with national law and logically to a benefit of the same CFREU, which has the same value with the European treaties, as a subject of effectiveness, that is evaluated case by case.

The Treaty of Lisbon has laid the foundations, through its own jurisprudence, to arguments, which draw and pass absolutely novelties with adequate motivations. The unfinished evolution is doubtful and linked to the peculiarities of the Union, translating, in a coherent way, the framework of an evolving constitutionalism.

The existence of exceptions of horizontal effects of directives as well as of deviations from the rule, as consequences of uncertainties, subsist to the notion of horizontal effects, that the CJEU addresses, as indirect consequences of a negative nature.

The principle affirmed by CJEU in *Thelen Technopark Berlin* and *Gabel Industria Tessile e Canavesi* case represents a return to the origins, that is to the principle of sovereignty, which sees the primacy of the law as a tool of balance between national and European competences, as an arbitration between two powers in continuous challenge both sovereign in their own dimension.

The primacy of the law of the Union, as a unilateral means and as an expression of prevalence, hierarchical of secondary norms invading a space of the CJEU, is recognized and it is up to the

states only to fill the difference between solutions from state to state in a way consistent with the nature of the directives to a system of the Union based on diversity to be safeguarded.

In some Member States, the horizontal effect of the directives is recognized, as a consequence, that does not express an interaction between legal systems and the principle of loyal cooperation, according to Art. 4, par. 2 TEU (Kellerbauer, Klamert, Tomkin, 2024), for the Union and the Member States, which respect and assist in a reciprocal way the fulfillment of the obligations deriving from the treaties.

In a reciprocal way, a two-way collaboration is relevant respecting the reciprocal competences and translating the effectiveness of the directives, as well as the plurality of solutions at national level, that is, into a competition between different legal identities, which find their origin and basis in the mechanism of the Union itself.

The Treaty of Lisbon comes forward and takes on constitutional value in time with a decisive manner to a process of European integration, which has begun in the fifties (Griller, Ziller, 2008). The Treaty of Lisbon constitutes a constitutional road without end, which the Union has been living for many years, constituting a European Ithaca, which represents the bases for the coming years. It is confirmed that the works for a constitution are found through important stages of approach. In

practice, the constitutional works of the Union are in progress and in itinere for the coming years.

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